Supreme Court, U.S.
FILED
NOV 21 2001
OFFICE OF THE CLERK

No. 01-446

In The

Supreme Court of the United States

WELLINGTON TRADE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition For Writ Of *Certiorari* To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

D. JEFFREY GOSCH, ESQ.
Counsel of Record
120 E. Washington Street
Suite 731
Syracuse, NY 13202
(315) 472-4487

Of Counsel:
CHRISTOPHER J. WESSER, ESQ.

13 pp

QUESTIONS PRESENTED

In 1974, Congress enacted the modern version of 28 U.S.C. § 455(a), to broaden and clarify the grounds for disqualification of federal judges at all levels of the judiciary. Since the modern § 455(a) was enacted, several key questions have remained unresolved.

The Petition in this case raises the following single question:

1. When a panel of a federal Circuit Court of Appeals reverses a judgment on which a party prevailed, and that party learns after reversal that the impartiality of one of the panelists might reasonably be questioned and thereafter moves for *vacatur* of the panel's decision, may the Court of Appeals properly deny a motion to recall the mandate and for *vacatur* on "timeliness" grounds?

PARTIES AND RULE 29.6 STATEMENT

The caption reflects the parties to this proceeding. Wellington Trade, Inc., d/b/a "Containerhouse," was the plaintiff in the United States District Court for the Middle District of Florida and the appellee/cross-appellant in the original proceedings in the Eleventh Circuit. The United States was the defendant in the District Court and the appellant/cross-appellee in the original proceedings in the Eleventh Circuit.

After Wellington Trade learned of the circumstances supporting the disqualification of an Eleventh Circuit judge who sat on the panel in this case, Wellington Trade became the petitioner moving for *vacatur* in the Eleventh Circuit and the United States became the respondent.

Pursuant to Supreme Court Rule 29.6, Wellington Trade certifies that the statement included in its Petition for Writ of *Certiorari* remains unchanged.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

ARGUMENT 1

I. THE GOVERNMENT MISSTATES THE QUESTIONS PRESENTED 1

A. The Government Misstates The Issues 2

CONCLUSION 8

TABLE OF CITED AUTHORITIES

Cases

Holt v. Virginia,
381 U.S. 131 (1965) 5

United States v. Cooper,
872 F.2d 1, 3-4 (1st Cir. 1989) 5, 6

Statutes

28 U.S.C. § 455, *et seq.* ..... *passim*

28 U.S.C. § 455(a) 1

28 U.S.C. § 455(b)(1) 1

28 U.S.C. § 455(b)(4) 1

Other Authorities

Richard Flamm, Judicial Disqualification,
(Little, Brown: 1996) 7

ARGUMENT

I. THE GOVERNMENT MISSTATES THE QUESTIONS PRESENTED.

Any federal judge, even one sitting in a case involving an agency with the power to affect the judge's personal interest in bringing notoriety and prosperity to his hometown:

> ...shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a). Moreover, a judge must be vigilant in his subjective deliberations, for *any* federal judge shall also disqualify himself where:

> He has a personal bias or prejudice concerning a party, [or]
>
> . . .
>
> He knows that he...has...*any other* interest that *could* be substantially affected by the outcome of the proceeding.

28 U.S.C. §§ 455(b)(1), (b)(4) (emphasis supplied).

The parties do not disagree on this principle. *See, e.g.* Brief for the United States in Opposition ("Opp.") at p. 4, n. 1, *citing* 28 U.S.C. § 455(a). Rather,

the Petitioner and the United States disagree as to where the Court's focus should properly lie.

The government, in a totally new twist, ignores the issues presented by Judge Collier's failure to follow § 455, and states the question simply as whether the Eleventh Circuit "abused its discretion" in this single case. *See* Opp., p. I. The issue is not quite that simple, however. The Eleventh Circuit's summary ratification of Judge Collier's failure in this case is indicative of the way litigants, and more importantly the judicial system, are routinely denied by the Courts of Appeals the protections Congress intended when it crafted 28 U.S.C. § 455. *That* is an issue which potentially reaches all cases, which is why the Court should grant *certiorari.*

A. The Government Misstates The Issues.

The United States misses the real questions presented in this case by focusing solely on whether there is a split among the circuits with respect to the Petitioner's burden under § 455. To that end, the government spends almost its entire argument questioning whether Petitioner satisfied the varying standards courts sometimes apply, without addressing the more fundamental question of whether Judge

Collier's alleged disqualification should have been summarily overlooked by the Eleventh Circuit.[1/]

Significantly, whether Petitioner fulfilled some amorphous burden or passed a particular test is not at issue, for the Eleventh Circuit never indicated any test was applicable – much less demonstrably applied one – in this case. Instead, after Petitioner went to great lengths both to pull together public record information (which Petitioner was not even fully aware existed and was still researching until shortly before filing its motion below, *see* Pet., pp. 9-13) and to find an attorney willing to challenge the federal appellate judiciary, the Eleventh Circuit simply stated, in one word, that Wellington Trade's motion was "untimely."

The key question this case presents is whether the Courts of Appeals may continue to turn litigants away without applying any visible test whatsoever, a practice that frustrates the purposes of 28 U.S.C. § 455 and makes it nearly impossible for a litigant in Petitioner's situation even to find counsel, *see* Pet. at 21.

[1/] Judge Collier was, and remains, a judge of the United States District Court for the Northern District of Florida, who sat by designation on the original Eleventh Circuit panel in this case. *See* Petition for Writ of *Certiorari* ("Pet."), p. 8. *See also* Pet., pp. 9-13 (Judge Collier's interests subordinate to the Navy's).

Judges sitting on a Court of Appeals panel are almost *never* challenged under 28 U.S.C. § 455 by attorneys for the parties. Indeed, a far-disproportionate number of reported opinions involve the disqualification of district judges, to the near exclusion of reported opinions concerning judges at the federal appellate level. *See, e.g.* Pet., pp. 19-23.

As Petitioner notes, the imbalance between cases involving district judges and cases involving appellate judges is startling. Two levels below this Court, in the district courts, judges have approximately five-hundred published decisions – covering the wide range of possible situations unique to the trial courts – to help guide their decisions. While there are approximately seventy-seven published opinions where a Court of Appeals found a district judge to be disqualified, there are *zero* published opinions where an appellate judge (or judge sitting by designation at the appellate level) was disqualified.[2/] Without exception, the effect has

---

[2/] The disparity between district and appellate judge disqualification suggest three possibilities: (1) appellate judges have been perfect in their decisions to recuse or not recuse themselves; or (2) litigants simply have not challenged their failure to recuse; or (3) the judicial system – which 28 U.S.C. § 455 was designed to protect – is just not working when it comes to the disqualification of appellate judges. Of those three possibilities, the first is simply implausible, while the latter two both counsel in favor of Petitioner's arguments..

been that, at the appellate level, 28 U.S.C. § 455 has become a statute without effective judicial review.

The consequential effect on the rule of law, on the rights of litigants to an unbiased tribunal, and on the need for a system where the tribunal appears unbiased is absolutely chilling. Indicative of that chill is the fact that in the approximately three dozen instances where the Courts of Appeals have even addressed disqualification at the appellate level, only a handful of the parties raising the issue were represented by a "regular" member of the bar. As Petitioner has set forth, in nearly ninety-percent of such cases, the issue was either raised, *sua sponte*, by the court, or by litigants acting *pro se* (or represented by a *pro bono* legal "project" or group). *See* Pet. at 21.

The cause for this statistic is readily apparent. As this Court has recognized, a motion to recuse even a trial judge is "inherently offensive" – and federal courts have taken offense at such filings, even when appropriate and when counsel is duty-bound to so move. *See, e.g. United States v. Cooper*, 872 F.2d 1, 3-4 (1st Cir. 1989), *citing Holt v. Virginia*, 381 U.S. 131, 137 (1965). The reason for this inherent offensiveness is obvious, for a motion to recuse a trial judge

> requires the moving party to allege and substantiate bias and prejudice – traits contrary to the impartiality expected from a mortal cloaked in a judicial robe.

United States v. Cooper, 872 F.2d at 4.

If judges of the Courts of Appeals are able to recognize that the issue of disqualification represents an affront to a *district* judge in question, Petitioner asks this Court to consider how threatening the issue must appear to most attorneys asked by a client or potential client to raise the issue with respect to an *appellate* judge. Between this implicitly intimidating situation and the fact that there is not one published case where this Court or any of the Courts of Appeals have ever upheld a litigant's motion to disqualify an appellate judge, it is not surprising that the vast majority of these few litigants who do raise the issue are not represented by regular counsel.

Moreover, the total absence of published case law upholding the disqualification of federal appellate judges serves as a strong deterrent – an almost prohibitive object lesson – for attorneys who might otherwise be willing to move to disqualify an appellate judge who (in the litigant's view) violated 28 U.S.C. § 455.

Against this backdrop, with its dearth of case law discussing federal appellate disqualification, unique legal questions arise. For example, as Petitioner notes, there is the potential "harmless error" issue associated with having only one panelist disqualified, as occurred in this case. *See, e.g.* Pet., pp. 21-22; Lodging, pp. 66-68. Likewise, if Judge Collier were found to have been

disqualified, the appropriate remedy in this case is unclear. *See, e.g.* Pet., p. 22; Lodging, pp. 71-74.

Without extant guidance from this Court, in particular, or from the Courts of Appeals (which have uniformly avoided these issues), the total absence of case law upholding disqualification at the federal appellate level will continue to serve as an insurmountable barrier to litigants seeking an unbiased judicial process. *See, e.g.* Richard Flamm, Judicial Disqualification, pp. 848-850 (Little, Brown: 1996).

At the end of its Opposition, almost as an afterthought, the government makes a salient point:

> Generally, this Court grants certiorari to resolve important and recurring issues on which the courts of appeals have divided, cf. Sup. Ct. R. 10(a), not *issues that the courts of appeals have neglected.*

Opp., p. 9 (emphasis supplied).

In more than seventy-seven years of active litigation under 28 U.S.C. § 455 or its predecessor, the Courts of Appeals have neglected to publish even one opinion upholding a litigant's challenge to an appellate judge. That neglect, combined with the unique questions presented by federal appellate disqualification that Petitioner has pointed out in this case, makes the issues presented here "important." Just because the

Courts of Appeals hide the problems by issuing summary, unpublished opinions – like the Eleventh Circuit did in this case – is no reason to believe these issues are not "recurring."

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* in this case.

Respectfully submitted,

D. Jeffrey Gosch
Counsel of Record
120 East Washington Street
Suite 731
Syracuse, NY 13202
(315) 472-4487

Of counsel:
Christopher J. Wesser, Esq.